



MONTANA LEGISLATIVE BRANCH

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To: Legislative Finance Committee

From: Taryn Purdy

RE: Authority of the Legislative Finance Committee – Legal/Other

INTRODUCTION AND STATEMENT OF PURPOSE

Issues have arisen over the Legislative Finance Committee's (the committee's) legal stature and recourse in compelling action by agencies and in requesting binding legal opinions when interpretation of statute is in question. Specifically, at its most recent meeting, a question arose before the committee relating to interpretation of language in HB 2. An opinion was requested of Greg Petesch, Code Commissioner for the State of Montana and head of Legal Services for the legislature, concerning the committee's general legal recourses to compel compliance with HB 2 and other laws.

The memorandum from Greg Petesch to Clayton Schenck is attached (Appendix A). Mr. Petesch outlines three avenues of committee recourse.

1. Powers of persuasion, with the ability to initiate impeachment proceedings if a failure to comply persists
2. Introduction of legislation in the next session
3. Initiation of a legal proceeding, including injunction or writ of mandamus

It is not the purpose of this paper to restate Mr. Petesch's memo. Instead, it will expand on some of the factors the committee may wish to take into consideration when determining which of the courses to follow in general. It also includes a brief introduction to the issue of HB 2 language in general, more of which will be discussed in a later meeting of this committee and in joint Senate Finance and House Appropriations Committee training planned for the 2003 legislative session.

In addition, a question arose about recourse when statute was unclear or seemed contradictory, and legal opinions were at odds. This paper also discusses the committee's standing to request an attorney general opinion and provides options for a course of action.

The discussion focuses on potential committee action in cases where statute is not clear or is not being followed. However, the general discussion of the committee's legal authority and options are also germane to those instances where the committee has requested information and/or action by agencies and others.

ISSUES OF NONCOMPLIANCE VS. ISSUES OF CONFLICT OR AMBIGUITY

The committee has different options and may wish to pursue different actions based upon whether the issue is of noncompliance with or ambiguity of the law in question.

Issues of Noncompliance

It is strictly a committee decision whether to take legal action to compel compliance when there appears to be no ambiguity or conflict in the law. However, the committee may wish to keep a number of points in mind when confronted with this situation.

The legislature is the only body of state government with the power to make laws. Laws may only be made or changed during a lawful legislative session.

- 1) Does the committee wish to be contrary to law or to allow agencies to be contrary to law as established by the full legislature?
- 2) Can individual legislators question or ignore policy and statute during the interim, even if some opinion seems to favor a re-examination?
- 3) If the law established by the legislature is not followed through or defended, what message does the committee send to agencies and individuals about whether they need to follow other laws?
- 4) The legislature is an equal branch of government with the executive and the judiciary. Like them, the legislature has unique powers. Does the legislature undermine its primary power – to make laws – if the requirement to comply with those laws is not enforced?
- 5) Initiation of legal action is resource consuming and presents a negative image of state government. Can the real possibility of legal action through precedence compel compliance in future cases without the necessity of legal action? Can it enhance the ability of the committee and its staff to access timely information?

Compliance with HB 2 Language in General

A discussion of noncompliance with the law provides a segue into a discussion of HB 2 language in general. HB 2 appropriations and all conditions of appropriations (including language) are law for the biennium until successfully challenged. Agencies and others are compelled to follow the law as passed by the legislature. Issues have arisen at various times when agencies have not followed the law as stated in HB 2 language.

HB 2 language must be carefully crafted to meet the legislature's purposes effectively. A thorough discussion of this topic is beyond the scope of this report, but as stated earlier will be the subject of further committee discussion and legislative training. However, the following points relate to the current discussion.

- 1) If language is included in HB 2 for which the legislature is not willing to compel action, it leaves legislative committees and agencies with the dilemma of trying to determine

which language is truly important and worth the effort to either meet or require compliance and which is not.

- 2) Any language included in HB 2 for which the legislature does not really expect or care about compliance undermines the authority of the entire bill.
- 3) Any ambiguous language allowed to remain in HB 2 without challenge or clarification as to legal authority undermines the authority of the entire bill.

The issue can also be expressed in this way:

Is the committee prepared to defend HB 2 language and conditions in court, and compel action by agencies through legal means if necessary? Reluctance to compel may be caused by any number of factors:

- 1) The ruling could go against the legislature. For example, the conditions could be declared invalid in a court, jeopardizing not only legislative intent but also the entire bill, or resulting in related court rulings neither anticipated nor desired by the legislature.
- 2) The legislature does not really care if the language is followed or not.
- 3) Members of the legislature are ambivalent about the language due to changing circumstances.

If any of these factors are present, the committee may wish to seriously consider whether the language should be included in HB 2 at all. Options for including statements of legislative intent and direction other than HB 2 language, and the types of issues the committee may wish to address with language, will be discussed in future meetings of this committee.

The Powers of Persuasion

Since legal action is a major step that obviously should not be taken lightly, in matters where there is little or no ambiguity or conflict, the powers of persuasion noted by Mr. Petesch take on an added importance. This “power” is not one that the committee should dismiss or take lightly. It is a true power.

- 1) Agencies must follow the law or be subject to its prescribed remedies. The LFC represents the legislature. Consequently, the LFC represents the law and agencies’ requirements to follow the law¹.
- 2) Agencies generally make every attempt to follow the law and answer all LFC requests for information. This attempt follows not only from the possibility of sanction for noncompliance, but with the stature of this committee.
- 3) The stature of this committee and its ability to compel action, including the provision of information, may need to be reinforced in cases of what appears to be deliberate lack of diligence.
- 4) The stature of the committee and its legal powers mean that the committee and its staff have an obligation to not be capricious or cavalier in requests for information or the compulsion of appearance before the committee.

¹ Including budget amendment and supplemental appropriations law.

Issues of Conflict or Ambiguity

As Mr. Petesch states, taking persuasive or legal recourse to compel compliance when the law is open to different legal interpretations can be difficult. In issues where interpretation of statute is in dispute, and contradictory legal opinions are rendered, the committee has recourse to an opinion by the attorney general. Until challenged in court, this opinion has all legal standing, to which all parties must adhere. The issue for the committee, then, is the circumstances under which it wishes to resolve the differences in interpretation through the request of an attorney general's opinion.

- 1) Do the different interpretations allow what appears to be noncompliance with legislative intent? Does the committee wish to allow continued confusion over the law passed by the full legislature, even if some opinion seems to favor re-examination of the law?
- 2) What threshold should be used before an opinion is requested?
- 3) If different interpretations are allowed to result in noncompliance, what message does this send to agencies and individuals?
- 4) Does this open the door for dueling legal opinions when an agency doesn't like the law?

Implicit in any decision to pursue an attorney general's opinion is, of course, the possibility that the answer may not be what the committee would prefer.

ATTORNEY GENERAL OPINION

As stated, in issues where interpretation of statute is in dispute, and contradictory legal opinions are rendered, the state has recourse to an opinion by the attorney general. Until challenged in court, this opinion has all legal standing, to which all parties must adhere. A question arose at the October LFC meeting concerning who has the legal authority to request an opinion from the attorney general.

Statute states the following:

2-15-501. General duties. It is the duty of the attorney general:

...(7) to give an opinion in writing, without fee, to the legislature or either house of the legislature, to any state officer, board, or commission, to any county attorney, to the city attorney of any city or town, or to the board of county commissioners of any county of the state when required upon any question of law relating to their respective offices. [*Emphasis added.*] The attorney general shall give the opinion within 3 months following the date that it is requested unless the attorney general certifies in writing to the requesting party that the question is of sufficient complexity to require additional time. If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion is controlling unless overruled by a state district court or the supreme court.

In addition, the attorney general has written guidelines to interpret this statute (Appendix B). There are three issues for consideration.

- 1) According to Mr. Petesch, the statute does not allow a standing committee such as the Legislative Finance Committee to request an opinion.
- 2) While most of the statute is very clear, Mr. Petesch states that use of the term “state official” is ambiguous, and could be interpreted to mean unelected officials such as the Legislative Fiscal Analyst. However, the attorney general’s written guidelines (Appendix B) state that the requestor must have standing to request the opinion, including that a state official be elected, which would preclude request by committee staff. The guidelines also exclusively refer to “leadership of the House and Senate” among those who can request an opinion (joint request representing the legislature as a whole). Under this interpretation, only leadership of the House or Senate could request an opinion on a matter in dispute before a standing committee or any other body of the legislature. (According to Chief Counsel, because of its context in the statute, the term “state official” probably excludes individual legislators.)
- 3) Under the attorney general’s guidelines, he will not accept for opinion any question of interpretation during a legislative session, while the bill is still being deliberated on by the legislature and/or yet to be signed into law by the Governor. Consequently, any change to the law should, according to Mr. Petesch, preclude committees from requesting legal opinions during the legislative session, leaving the right only to those standing interim committees. As leadership is “on-site” during the legislative session, an opinion could be requested from leadership on any disputes that arose on laws already in existence during a legislative session.

Issue

Given the preclusion of request by standing interim committees and the ambiguity of the term “state official”, does the committee wish to clarify who may request an attorney general’s opinion?

Options

- 1) Authorize a bill draft to clarify that standing interim committees may request an attorney general’s opinion.
- 2) Authorize a bill draft to clarify whether a state official must be elected in order to request an opinion.
- 3) Do not authorize a bill draft.